U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF S-T- INC.

DATE: MAR. 2, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology development and consulting services, seeks to permanently employ the Beneficiary as a software engineer under the immigrant classification of member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) § 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the *bona fides* of the job offer or the Petitioner's continuing ability to pay the proffered wage. Accordingly, the Director denied the petition on July 16, 2015.

The matter is now before us on appeal. The Petitioner submits additional evidence and argument in support of the *bona fides* of the job offer and its ability to pay. Upon *de novo* review, we will dismiss the appeal.

I. THE BONA FIDES OF THE JOB OFFER

An employer "desiring and intending" to employ a foreign national in the United States may file an immigrant petition on his or her behalf. INA § 204(a)(1)(F), 8 U.S.C. § 1154(a)(1)(F).

A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a petition denial where a petitioner did not intend to employ a beneficiary as a live-in domestic worker pursuant to the accompanying labor certification). For labor certification purposes, the term "employment" means "[p]ermanent, full-time work by an employee for an employer other than oneself." 20 C.F.R. § 656.3.

The instant petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The labor certification states the area of intended employment of the offered position of software engineer as Clearwater, Florida, where the Petitioner is headquartered, and "various unanticipated client sites nationally requiring relocation & travel to these sites involving short & long term assignments."

A. The Purported Discrepancy between the Petitioner's Numbers of Employees and Visa Petitions

The Director's request for evidence (RFE) of December 3, 2014 requests additional evidence of the Petitioner's intention to employ the Beneficiary in the offered position. The RFE states the Petitioner's filing of 129 petitions for immigrant and nonimmigrant workers with U.S. Citizenship and Immigration Services (USCIS) since December 5, 2011. However, on the Form I-140, Immigrant Petition for Alien Worker, the Petitioner stated its employment of only 31 employees.[1]

The Director found that the difference between the Petitioner's numbers of visa petitions and employees cast doubt on its intention to employ its beneficiaries. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The Director apparently suspected that the offered positions stated in the petitions did not exist, or that the beneficiaries would be employed in the offered positions by businesses other than the Petitioner.

USCIS records do not support the Petitioner's explanation in its February 6, 2015, letter that the beneficiaries of about 65 approved H-1B nonimmigrant petitions "never joined the petitioner due to employee/consulate issues (subsequently withdrawn)." However, USCIS records also do not support the Director's finding that the amount of visa petitions filed by the Petitioner indicates a lack of intention to employ the Beneficiary in the offered position.

USCIS records indicate the Petitioner's filing of 127 nonimmigrant and immigrant visa petitions from December 5, 2011 until the issuance of the Director's RFE on December 3, 2014.[2] USCIS records identify 98 of the 127 petitions as petitions for H-1B nonimmigrant workers. Like the instant petition, the remaining 29 petitions are I-140 petitions for H-1B workers of the Petitioner.

USCIS records also indicate that 39 of the Petitioner's 98 H-1B petitions were denied, revoked, or rejected. The Petitioner filed the remaining 59 H-1B petitions on behalf of 39 people, as 20 petitions sought extensions of status for existing employees. In addition, the Petitioner submitted evidence of its withdrawal of five H-1B petitions between 2012 and 2014.[3]

The record does not indicate a material discrepancy between the Petitioner's stated employment of 31 people and its filings since December 5, 2011 of H-1B petitions for 39 people and I-140 petitions for 29 of those people. The Petitioner's Forms W-2 for 2013 and 2014 indicate payments in one or both years to 37 of its 39 H-1B beneficiaries and to 26 of its 29 I-140 beneficiaries. The record therefore does not indicate the Petitioner's filing of petitions without intentions to employ their beneficiaries.

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[1] The Petitioner's number of employees varies in the record. The Form I-140 and accompanying labor certification state the Petitioner's employment of 31 workers. However, in a February 6, 2015, letter in response to the Director's RFE, the Petitioner stated its employment of 25 people.

[2] The Director's petition count of 129 appears to have included two Form I-290Bs, Notices of Appeals or Motions.

[3] It is unclear whether three of the Petitioner's withdrawal requests were effective. USCIS records indicate that revocations of the approvals of the three petitions occurred within days of their purported withdrawals by the Petitioner. However, USCIS records also indicate the Petitioner's withdrawal of an additional two H-1B petitions.

Thus, the record does not support the Director's finding that the amount of visa petitions filed by the Petitioner indicates a lack of intention to permanently employ the Beneficiary in the offered position.

B. The Permanent, Full-Time Nature of the Offered Position

The Director's RFE sought: the address of the Beneficiary's intended worksite; copies of contracts under which she would be employed in the offered position; and identification of the entities that would pay her and control her work.

In response to the RFE, the Petitioner submitted the February 17, 2015, letter from its former president/sole shareholder.[4] The letter states the company's intention to permanently employ the Beneficiary in the offered position on a full-time basis. The letter also states the Petitioner's intention to pay her proffered wage and control her work while she performs the job duties of the offered position at contracted client sites. The letter states: "Once a particular software development-consulting project is completed, the contract is effectively over and the Software Engineer is then assigned to another project at another site or at the petitioner's development projects."

The Petitioner also submitted a sample copy of a client contract for its services, effective January 2, 2015. However, the Director faulted the contract and other documentation submitted by the Petitioner for failing to identify the Beneficiary as a worker on the project or to specify: her rate of pay; her hours; the length of her employment; the worksite address; and the entity that would pay her. Noting that the sample contract became effective after the petition's priority date, the Director also found that the document did not evidence "a job offer available to the beneficiary at the time this petition was submitted to USCIS."

In *Matters of Amsol, Inc.*, 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009), the Board of Alien Labor Certification Appeals (BALCA) considered the *bona fides* of job offers similar to the instant position. As in the instant case, the employer in *Amsol* sought to employ software engineers from its headquarters and at other "unanticipated" client sites in the United States. *Amsol*, 2009 WL 2869970 at *3.

The DOL in *Amsol* stated its initial inability to determine whether the offered positions constituted full-time, permanent jobs because the record lacked evidence regarding: specific clients for whom the beneficiaries would work; their proposed lengths of employment; and the effect of terminations of client contracts on their status and compensation if no imminent re-assignments existed. *Id.* The DOL requested additional evidence from the employer, including copies of contracts under which the foreign nationals would work in the offered position. *Id.*

[4] Online government records indicate removal of the letter's signatory as the Petitioner's president and corporate secretary on July 27, 2015, shortly before the filing of the instant appeal. *See* Fla. Dep't of State, Div. of Corps., at [redacted] (accessed Jan. 6, 2016). A copy of the Petitioner's 2013 federal income tax return, the most recent return of record, identifies the letter's signatory as the corporation's sole shareholder. The record does not indicate whether the letter's signatory remains the Petitioner's sole shareholder.

The employer in *Amsol* provided copies of client contracts under which the foreign nationals worked in the offered position. *Id.* at *9. However, the DOL denied the labor certification applications, finding that the contracts did not provide addresses, job duties, or work schedules as requested. *Id.* In vacating the DOL's decisions, BALCA stated: "While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Id.*

The DOL also found that the employer in *Amsol* did not address the effect of client contract terminations on the status and compensation of the foreign nationals. *Id.* However, BALCA found that tax documentation and copies of numerous client contracts submitted by the employer demonstrated its generation of ongoing business sufficient to continually employ the foreign nationals. *Id.*

In the instant case, the Director erred in requiring the Petitioner to submit evidence of the Beneficiary's intended worksite addresses and contracts under which she would work in the offered position from the petition's priority date. As BALCA stated in *Amsol*, "requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Amsol*, 2009 WL 2869970 at *9.

Moreover, as the Petitioner argues, an immigrant visa petition represents an offer of future employment. USCIS regulations do not require the Beneficiary to currently work for the Petitioner in the offered position, or even her current physical presence in the United States. The Petitioner's inability to produce contracts and details of the Beneficiary's future work assignments does not preclude the Petitioner's intention to employ her in the offer position.

While the Petitioner need not provide contracts and proposed work assignments specific to the Beneficiary, it must establish the existence of a valid job offer as of the petition's priority date. It is therefore reasonable to expect evidence of prior and ongoing development projects on which the Beneficiary could have worked in the offered position. However, unlike the employer in *Amsol*, the Petitioner submitted a copy of only one client contract. The record therefore does not establish the Petitioner's intention to permanently employ her in the full-time offered position from the petition's priority date onward.

The Petitioner submitted tax documentation indicating its generation of substantial business and copies of payroll records indicating regular monthly payments to the Beneficiary and to other employees for full-time services rendered in 2014. These materials demonstrate the Petitioner's general business activities. However, the materials do not establish its intent to employ the Beneficiary in the specific offered position of software engineer.

The Petitioner did not submit sufficient evidence to establish its intention to employ the Beneficiary in the offered position on a permanent, full-time basis. We will therefore affirm the Director's finding that the record does not establish the *bona fides* of the job offer.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of software engineer as $83,800 per year. The petition's priority date is July 31, 2013, the date the DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The record before the Director closed on February 20, 2015, with his receipt of the Petitioner's response to his RFE. At that time, required evidence of the Petitioner's ability to pay the proffered wage in 2014 was not yet available. We will therefore consider the Petitioner's ability to pay only in 2013, the year of the petition's priority date.[5]

In determining a petitioner's ability to pay, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay a beneficiary the full proffered wage, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between the proffered wage and the wages paid, if any. If a petitioner's net income or net current assets are insufficient, we may also consider other evidence of its ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[6]

In the instant case, the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating its payment to the Beneficiary in 2013 of $60,704.83. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $83,800. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on the wages it paid the Beneficiary. However, we credit the Petitioner's payment to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amount it paid the Beneficiary in 2013, or $23,095.17.

The Petitioner's federal income tax returns reflect annual amounts of net income and net current assets in 2013 of $103,478 and $233,537, respectively. Although both of these amounts exceed the difference between the annual proffered wage and the Petitioner's payments to the Beneficiary in 2013, as stated in the Director's RFE, USCIS records show the Petitioner's filing of multiple I-140 petitions.

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[5] In any future filings in this matter, the Petitioner must submit a copy of an annual report, federal income tax return, or audited financial statements for 2014 pursuant to 8 C.F.R. § 204.5(g)(2).

[6] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, -- F. Supp. 3d --, 2015 WL 3634497, *5 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, -- Fed. Appx. --, 2015 WL 5711445, *1 (5th Cir. Sept. 30, 2015).

USCIS records indicate the Petitioner's filing of 10 petitions for other beneficiaries from the instant petition's priority date of July 31, 2013 to the RFE's issuance on December 3, 2014.[7] USCIS records also indicate the Petitioner's filing of 19 other petitions before the instant petition's priority date that remained pending thereafter.[8]

A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). Therefore, the instant Petitioner must demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions that remained pending after the instant petition's priority date. The Petitioner must establish its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until the petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

In response to the Director's RFE, the Petitioner submitted a chart identifying five other I-140 petitions that it filed after the instant petition's priority date. The Petitioner also submitted copies of IRS Forms W-2 indicating its payments to the petition beneficiaries in 2013.

However, the Petitioner did not provide information about the five other petitions that it filed from the instant petition's priority date until the issuance of the Director's RFE, or the 19 petitions that it filed before the instant petition's priority date that remained pending thereafter. The record does not document the priority dates or proffered wages of these other petitions, or whether the Petitioner paid wages to their beneficiaries. The record also does not indicate whether any of these other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries.

In addition, the Petitioner states total proffered wages for the five pending petitions identified by it of $432,630, and its total payments to their beneficiaries in 2013 of $162,088.08. The difference between the proffered wages and the wages paid by the Petitioner in 2013 is $270,541.92. Neither the Petitioner's annual amount of net income nor net current assets in 2013 equals or exceeds this amount. The record therefore does not demonstrate the Petitioner's ability in 2013 to pay the proffered wages of the five beneficiaries it identified, let alone the proffered wages of the 24 other petitions that remained pending after the instant petition's priority date.

[7] USCIS records identify the other petitions by the following receipt numbers:

The Petitioner argues that it need only pay portions of two proffered wages that occurred after the pending petitions' respective priority dates of July 31, 2013 and August 3, 2013. However, the record does not indicate the beneficiaries' receipts of the entire amounts stated on their Forms W-2 after the respective priority dates. Rather, it appears that the Forms W-2 reflect payments to the beneficiaries over the entire year of 2013. We will not consider 12 months of payments to demonstrate an ability to pay five-month periods of proffered wages. Absent evidence of the beneficiaries' receipt of sufficient wages after the priority dates of their respective petitions, we require the Petitioner to demonstrate its ability to pay the full, annual proffered wages of all its beneficiaries in 2013.

The Petitioner also argues that it had additional funds available in a bank account to pay proffered wages in 2013. The record contains copies of 2013 bank account statements of the Petitioner indicating an average, end-of-month balance of $62,035.21.

However, the funds in the bank account appear to be included in the "cash" amount of $268,145 stated on Schedule L of the Petitioner's 2013 Form 1120S, U.S. Income Tax Return for an S Corporation. We considered those assets in determining the Petitioner's net current assets in 2013. The record does not indicate that the funds in the bank account supplement the Petitioner's stated net current assets for 2013. We therefore will not consider the funds in the bank account as available to pay proffered wages.

As previously indicated, pursuant to *Sonegawa*, we may consider other evidence of a petitioner's ability to pay a proffered wage. In *Sonegawa*, the petitioner conducted business for more than 11 years, routinely earning gross annual incomes of about $100,000 and employing at least four, full-time workers. *Sonegawa*, 12 I&N Dec. at 612. During the year of the petition's filing, however, the petitioner's federal tax returns did not reflect its ability to pay the proffered wage. *Id.* at 614. In that year, the petitioner relocated its business, causing it to lease two locations for a five-month period, to incur substantial moving costs, and to briefly suspend its business operations. *Id.* Despite the financial setbacks, the Regional Commissioner determined that the petitioner would likely resume successful business operations and had established its ability to pay. The record established the petitioner as a fashion designer whose work had been featured in national magazines. *Id.* at 615. Her clients included the then Miss Universe, movie actresses, society matrons, and women on lists of the best-dressed in California. *Id.*

As in *Sonegawa*, we may consider evidence of a petitioner's ability to pay beyond its net income and net current assets. We may consider such factors as: the number of years it has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of its ability to pay a proffered wage.

In the instant case, the record indicates the Petitioner's continuous business operations since 2011.[9] Although the record contains copies of 50 IRS Forms W-2 issued by the Petitioner in 2013, the most

[9] The Form I-140 states the Petitioner's establishment in 2001. However, the accompanying labor certification, copies of the Petitioner's federal income tax returns for 2012 and 2013, and online government records indicate its incorporation in

recent evidence of record, the February 17, 2015, letter of the Petitioner's former president/sole shareholder, indicates its current employment of only 25 workers. Copies of the Petitioner's 2012 and 2013 federal income tax returns reflect increasing gross annual revenues, and amounts of salaries and wages paid.

Unlike in *Sonegawa*, however, the instant record does not indicate the occurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its industry. The record also does not indicate the Beneficiary's replacement of a current employee or outsourced service.

Also unlike in *Sonegawa*, the instant Petitioner must demonstrate its ability to pay multiple beneficiaries and did not provide requested information about all of its pending petitions. *See* 8 C.F.R. § 103.2(b)(14) (stating that "[f]ailure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the benefit request"). Thus, assessing the totality of circumstances in this individual case, the record does not establish the Petitioner's continuing ability to pay the proffered wage pursuant to *Sonegawa*.

For the foregoing reasons, the record does not establish the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's decision and dismiss the appeal.

III. CONCLUSION

The record does not establish the *bona fides* of the job offer or the Petitioner's continuing ability to pay the proffered wage from the petition's priority date onward. We will therefore affirm the Director's denial of the petition and dismiss the appeal.

The petition will be denied for the foregoing reasons, with each considered an independent and alternative basis for denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. INA § 291, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of S-T- Inc.*, ID# 15686 (AAO Mar. 2, 2016)

See Fla. Dep't of State, Div. of Corps., at

(accessed Jan. 13, 2016).